

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TURNER BROADCASTING SYSTEM,
INC., et al.,

Plaintiffs,

v.

FEDERAL COMMUNICATIONS
COMMISSION, et al.,

Defendants.

Civil Action No. 92-2247
(and Consolidated Cases
Civil Action Nos. 92-2292,
92-2494, 92-2495, 92-2558)

(SFW, TPJ, SS)

APPENDIX TO
PUBLIC BROADCASTER DEFENDANT-INTERVENORS'
MOTION FOR SUMMARY JUDGMENT

VOLUME 1

(DECLARATION OF DAVID J. BRUGGER)

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Dated: May 26, 1995

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DECLARATION OF DAVID J. BRUGGER

1. Since January 1988, I have been the President of the Association of America's Public Television Stations ("APTS"). (APTS was previously known as the National Association of Public Television Stations ("NAPTS").) As President, I am responsible for supervising all aspects of APTS activities. From 1981 to 1988, I held the positions of Director, Broadcast Services, Vice President, Telecommunications, and Senior Vice President at the Corporation for Public Broadcasting ("CPB"). During my tenure at CPB, I was responsible, among other things, for administering grants made by CPB to noncommercial educational stations. From 1977 to 1981, I held the position of general manager of WUFT, a public television station located in Gainesville, Florida. From 1970 to 1977, I worked for the Iowa Public Broadcasting Network in production and operations

positions, including Director of Administration for the network, a position I held from 1973 to 1977.

2. APTS is a nonprofit organization whose members constitute about 80% of the public television stations in the United States. APTS represents the interests of all public television stations before Congress and federal administrative agencies. It also provides planning, research, and communications support services to APTS members.

3. Based on my past experiences, as well as my current position, I am very familiar with public television station operations. I personally know the majority of public television station managers. I speak with station managers, on almost a daily basis, about issues related to station operations, and I have frequent opportunities at industry meetings and during visits to stations to talk with station managers. Particularly during the period from 1988 to 1992, I had numerous discussions with station managers about cable carriage problems and concerns.

BACKGROUND

4. The federal government has played a key role in the development of public television in the United States. In 1952, the FCC authorized the allocation of a portion of the broadcast spectrum for noncommercial educational television and radio licenses. In 1962, Congress first provided funds for the construction of public television facilities. In 1967, Congress adopted the Public Broadcasting Act to encourage the growth and development of public television and radio stations. Over the years, a substantial amount of public television's financial resources have come from federal appropriations. From 1962 to the present, Congress has appropriated over \$4.8 billion in support of public broadcasting. In fiscal year 1995, the total annual federal appropriation for public broadcasting was \$285.6 million. This amounted to approximately 14 percent of

the total financial resources of public television stations in that year. Today there are 351 public television stations, operated by 179 public television licensees, spread across the country's approximately 211 television markets.

5. There is a wide variety among public television stations. Noncommercial educational television licensees include a diverse array of local school boards, municipalities and other state and local agencies, public and private colleges and universities, and a variety of other local and community-based non-profit organizations dedicated to providing educational, informational, cultural, and other alternative noncommercial programming to their communities. Some public television stations offer a high percentage of programming distributed by the Public Broadcasting Service ("PBS"). Others focus more on telecourses or other instructional programming from non-PBS sources. Still others concentrate on special interests of minority audiences.

6. In general, where there is more than one public television station serving a market, the different stations fill different niches. For example, in Miami, WPBT, licensed to a non-profit community organization, broadcasts primarily the PBS-fed program service. In contrast, WLRN, licensed to the Dade County School Board, provides primarily instructional programming in conjunction with the local schools, community colleges and universities.

7. Public television stations annually offer on an average almost 64,000 hours of local programming, including locally-oriented news and public affairs programs, locally-oriented instructional programming, programming providing outlets to local cultural and artistic groups, and coverage of local and state government activities. While many public television stations obtain programming distributed by PBS, each station makes local decisions about when to air particular programs and what parts of the PBS program schedule to use.

8. The local orientation of public television is particularly evident in its commitment to educational programming. Nearly 72,300 schools with over 29 million elementary and secondary students have access to public television instructional programming every day. As of 1993, public television stations have prepared 1.6 million adults, many of them disabled or of modest means and with no other effective option, to earn a General Education Development ("GED") certificate—the equivalent of a high-school diploma—through telecourses. In higher education, public television stations and the PBS Adult Learning Service, the country's largest university, provide degree track courses through accredited colleges throughout the country. Since 1981, local stations, in conjunction with more than 2,400 colleges and universities, have brought telecourses to more than 2.8 million adult students.

9. Public television stations also serve as vital local community institutions. All across the country, public television stations are actively engaged in their communities, serving as catalysts for local attention to and action on vital issues of local importance such as literacy, racial harmony, child care, youth violence, health care, AIDS, and the environment. In addition, public television has become a leader in providing innovative video services to groups of viewers who are too few or too impoverished to attract other broadcast service. For example, public television has been a principal source of programming for the disabled by developing closed captioning for the hearing impaired and descriptive video services for the visually impaired. Public television also remains a crucial source of programming for non-English speaking audiences by simulcasting selected programs in a second language.

APTS INVOLVEMENT IN CABLE CARRIAGE ISSUES

10. For many years, APTS has been involved with issues concerning cable carriage of public television stations. The ability to be carried on cable systems has been an extremely important factor in helping public television to meet the legislative goal of serving all Americans. Almost two-thirds of public television stations are assigned to hard-to-receive UHF frequencies (broadcast channels 14 and up). UHF signals are more easily obstructed by terrain, man-made obstacles and atmospheric conditions than are VHF signals (broadcast channels 2-13). In addition, reception of UHF signals often requires an outdoor antenna, which viewers may find too difficult or too expensive to install or maintain and which may be banned or severely restricted, depending on the community. APTS is keenly aware that carriage on cable systems permitted public television stations to expand their coverage and improve the quality of their reception significantly.

11. APTS has consistently supported measures to ensure that local public television stations will be carried on cable systems. Public television stations have a congressional mandate to provide alternative, noncommercial programming to their local communities. It only makes sense to ensure the public's access to local public television stations, especially when the public pays a large part of the cost through donations and taxes. When a public television station is dropped from a cable system, subscribers to that system lose access to that station's services. The station is cut off from viewers who provide it with private contributions. Because individual contributions are the largest single source of funds for public television (Public Broadcasting Income Report, Fiscal Year 1993, CPB 008562), and because many public television stations have limited resources and operate close to the margin, loss of any significant source of contributions can

cause significant financial injury to a station. I and other APTS officials have long been concerned that without financial support from cable households, many public television stations could easily slip below the level of viability needed to serve their broadcast audiences.

12. Along with other public television organizations, APTS participated in the Quincy and Century cases in order to argue that the Federal Communications Commission's "must carry" rules were constitutional and should be upheld. Subsequently, APTS participated actively in efforts to persuade the FCC to promulgate new "must carry" rules. APTS played an active role in obtaining passage of the public television "must carry" provisions of the 1992 Cable Act. APTS has also advised its members on how to ensure that they are carried by their local cable systems.

13. Over the years, APTS has regularly gathered information from public television stations about instances in which cable systems ceased to carry a local public television station or repositioned it to a less desirable channel. At the time I arrived at APTS, in January 1988, this function was being supervised by Dr. Bernadette McGuire, APTS's Director of Planning and Research. I received reports from Dr. McGuire concerning the procedures used to gather, record and verify the "drop" and "shift" information received from public television stations. In addition, I made a point of observing the work of individuals who worked on this project under Dr. McGuire's supervision.

14. During the period 1988 through 1992, APTS regularly received cable carriage information from general managers or other knowledgeable employees of public television stations. I am aware from my knowledge of APTS files that this also occurred in the 1985-1987 period, prior to my arrival at APTS. On several occasions, APTS sent surveys to public television stations and received responses reporting on drops, shifts, or other cable carriage experiences. Several

examples of survey forms received by APTS are attached as Exhibit 1. In other cases, station personnel forwarded to APTS copies of correspondence and other documents relating to cable carriage in response to our ongoing requests to keep APTS advised of adverse cable actions. I and other APTS personnel regularly received telephone calls from station personnel reporting on cable carriage problems.

15. Beginning in 1987, when Dr. McGuire joined APTS, APTS staff members working under her supervision periodically compiled lists of cable drops and shifts reported by public television station personnel. As part of this process, the individuals working under Dr. McGuire's supervision called cable system personnel in order to verify that drops and shifts had actually occurred and were still in place. Exhibit 2 is a form used by APTS staff to verify drops and shifts with cable operators. By the early 1990s, APTS staff members were also making efforts to determine whether the reported actions (including previously reported drops and shifts) involved cable systems whose headends were located within 50 miles of the station's community of license or within the station's Grade B contour.

16. Attached as Exhibit 3 are lists of drops and shifts prepared by Dr. McGuire and her staff. These lists were compiled from information supplied by station personnel knowledgeable about cable carriage matters affecting their stations and were prepared as part of a regular APTS business activity. Exhibit 3 shows drops and shifts of local public television stations reported to have occurred in the period from 1986 through September, 1989. Where available, the lists include information on, among other things, the name and location of the cable system, the nature of the action, the number of cable subscribers affected, the date of the cable action, the replacement programming, other public television stations in the area, and whether APTS had been able to obtain verification of the drop or shift from the cable system as of the date the list was created. Exhibit 3 shows 74

verified drops, 32 drops that were not yet verified, 128 verified shifts, and 56 shifts that were not yet verified. If a drop is not verified, it means that, as of the time the list was compiled, our staff either did not reach the cable system or the cable system was not able or willing to verify the information. If the cable system reported that a drop or shift did not occur, it was removed from the list.

17. Attached as Exhibit 4 is a list of drops and shifts prepared by Dr. McGuire and her staff in 1991. This list was compiled from information supplied by station personnel knowledgeable about cable carriage matters affecting their stations and was prepared as part of a regular APTS business activity. Exhibit 4 is a compilation of information received by APTS from local public television stations in response to a survey APTS sent out in May 1991. A copy of the survey form is attached as Exhibit 5. The survey sought information on recent adverse cable actions. Where available, the list includes the date and nature of the cable action, the name and location of the cable system, the number of miles between the cable headend and the station, the replacement programming, and any comments made by station personnel about harm to the station or harm to the public resulting from the adverse carriage action. The entries are divided into the following categories: actual drops within 50 miles, actual drops over 50 miles, actual drops where the station was restored, threatened drops, involuntary shifts to timesharing (sharing a cable channel with another program service), actual shifts, and actual shifts where the station was restored to its original channel. Exhibit 4 shows 16 drops and 21 shifts within 50 miles.

18. APTS has received additional documents from public television stations in the normal course of business that describe adverse carriage actions that are not reflected on either Exhibit 3 or 4. In order to provide a more comprehensive listing of APTS's information on drops and shifts, APTS staff have prepared a list that compiles and reorganizes information from Exhibits 3 and 4

and that also includes information from other APTS documents reporting on carriage actions in the 1986-1992 period. This list is attached as Exhibit 6.

19. I have carefully reviewed Exhibit 6 and have been fully briefed by my staff on the procedures used to compile it. The information on Exhibits 3 and 4 was edited to exclude drops or shifts involving cable companies outside the Grade B contour or 50-mile radius and was reorganized alphabetically by station call letter. APTS staff then added information from contemporaneous documents that were received by APTS, in the regular course of business, from station personnel knowledgeable about cable carriage matters affecting their stations. Before adding these new entries to the list, APTS staff made efforts to confirm that cable systems involved met either the 50-mile or the Grade B contour criterion contained in the definition of "local public television station" in the 1992 Cable Act. Reports of adverse action were not included if the underlying documentation did not have enough details or the APTS staff was unable to confirm that the cable system was local to the public television station. Exhibit 6 reflects 130 instances of drops, 203 instances of shifts, and six instances of unwanted timesharing that were reported by stations between 1986 and 1992.

20. Exhibit 6 should not be considered a comprehensive compilation of drops and shifts incurred by public television stations during the 1986-1992 time period. It merely reflects information that was available to the stations and was supplied voluntarily to APTS. Many of the smaller stations, which have been most affected by adverse cable actions, are not members of APTS and did not regularly communicate with us.

21. In some cases, cable systems restored dropped public television stations after a period of time. Where a station was restored, it was often because the station made strong efforts to enlist public support and bring political pressure to bear on the cable system. APTS provided stations with advice and assistance in

waging such campaigns for reinstatement. These campaigns required substantial time and resources to mount, and involved diversion of resources from other station activities. Even when a public television station was able to gather enough support to reverse an adverse cable action, it was required to divert resources in order to do so, and it continued to face the threat of unexpected cable actions at any time. Such experiences provided another basis for APTS's conclusion that must carry regulation is essential to protect public television stations.

22. In some cases, cable systems threatened to drop a public television station or to shift its channel position, but did not follow through on the threat. Such threats caused the station to face great uncertainty about whether it would suddenly be cut off from a substantial number of viewers. In some cases, the station averted the threat only by conducting an expensive public relations effort. Thus, even threats that were not carried out indicated to APTS the need for must carry requirements for public television stations.

23. Based on my discussions with station personnel, I am aware that it is often difficult for public television stations to keep track of cable carriage of their signals. In many cases, prior to passage of the Cable Act, cable companies did not provide advance notice that a station would be dropped or repositioned. Frequently, a station learned of a drop or shift only when a viewer called to complain, or when a pledge card was returned with a note that a former donor would no longer contribute because the donor could no longer access the station. In some cases, public television stations assigned staff members to monitor cable relations; but even with staff, it was often difficult to be aware of every change. Assigning staff to monitor cable carriage and foster cable relations adds costs and diverts resources from other station activities. Small stations simply do not have sufficient resources to monitor carriage in their service areas.

24. I believe that the cable drops and shifts reported to APTS between 1985 and 1992 understate the actual instances of drops and shifts, for several reasons. First, not all stations reported incidents to APTS. This was particularly true of non-APTS members, which included some of the smallest stations, which were most vulnerable to cable drops and shifts. Second, stations that did provide us with information did not necessarily report all instances. Third, as explained above, stations—particularly the smaller stations with many different cable systems operating in their service areas—simply could not keep track of cable drops and shifts of their signals.

25. In addition, it was common knowledge at the time that cable systems were exercising self-restraint during a period when must carry regulation was regularly under consideration at the FCC and in Congress. Indeed, I recall that James Mooney, President of the National Cable Television Association, essentially advised NCTA members that they should refrain from dropping or repositioning public television stations in the late 1980s and early 1990s. APTS members and staff believed that drops and repositioning of public television stations would be widespread if there were no threat of must carry regulation or legislation.

26. Based on my many conversations with station managers, and on information that APTS has received from stations over the years, I believe that drops or shifts will have an effect on viewership and on the station's ability to raise revenue through membership donations, and possibly underwriting. I and others at APTS concluded that drops and shifts could threaten the financial viability of public television stations. This is one of the reasons we concluded that it was important to press for must carry requirements for public television stations.

27. During the period from my arrival at APTS in January 1988 through the fall of 1992, APTS communicated to the FCC and to Congress the information it was collecting concerning drops and shifts of public television

stations and the concerns the stations had about their vulnerability to adverse cable actions in the absence of must carry regulation. In 1988, in FCC Docket 88-138, and in 1991, in FCC Docket 90-4, APTS provided the FCC with numerous reports of drops and channel repositioning received from stations. In addition, in testimony before Congress during 1989 and 1991, I and another public broadcasting representative provided examples of public television stations that had experienced adverse cable actions.

28. APTS also received copies of some of the letters public television stations sent to members of Congress reporting on the adverse cable actions the stations had experienced. APTS retained these copies in the regular course of business. Examples of such letters are attached as Exhibit 7. APTS also received copies from stations of some of the letters the members of Congress wrote to the stations or to the FCC in response to station letters on adverse cable actions, pending legislation to remedy these problems, and other such matters. APTS retained these copies in the regular course of business. Examples of such letters are attached as Exhibit 8.

THE 1990 NCTA-APTS AGREEMENT

29. In the late 1980s and early 1990, cable industry representatives indicated that they wished to work out a voluntary must carry agreement with public television. In early 1990, I began discussions with James Mooney, President of the National Cable Television Association. I presented proposed legislative points to Mr. Mooney for his consideration. My proposal expanded must carry rights for public television beyond the limits of the FCC's 1986 interim must carry rules. However, it also incorporated provisions designed to limit any burden on cable operators. Thus, under the proposal I presented, the number of public television stations to be carried varied with the channel capacity of the cable

system, and no system was required to carry more than three public television stations, unless the additional stations carried non-duplicative programming or the system had previously carried more than three local public television stations. APTS estimated that under its proposal only three percent of cable systems would be required to carry three or more public television stations and that, for 84 percent of cable systems, the proposal meant carriage of only one public television station.

30. Mr. Mooney was generally receptive to our proposal, but he expressed concern about several of its features. In response to Mr. Mooney's expressions of concern, I agreed to several changes in the proposed language. First, I agreed that for cable operators with a channel capacity of 36 or fewer channels, the number of public television signals would be capped at three, except that if a cable system operator subsequently upgraded to a larger channel capacity the operator would carry any additional qualifying public television signals. In addition, I agreed to add a provision that if a cable operator was required to pick up public television stations not already being carried, it could use unoccupied public, educational or governmental ("PEG") channels to carry those stations, subject to approval by the local franchising authority. (Under the Cable Communications Policy Act of 1984, a franchising authority may require a cable operator to designate channels for public, educational or governmental use.) I also agreed that APTS would not seek legislation providing public television stations with the right to seek payment for cable carriage. A copy of my letter to Mr. Mooney setting out those changes is attached as Exhibit 9.

31. In late March 1990, NAPTS and NCTA reached final agreement on a "must carry" proposal for public television that they would jointly recommend to Congress. Mr. Mooney took our agreement to the NCTA Board and subsequently advised me that the Board had approved the terms of the agreement. The press release issued by NCTA and NAPTS announcing the

agreement is attached hereto as Exhibit 10. In the joint press statement, Mr. Mooney stated, "From the outset, it's been the intention of both our industries to put in place a pure and simple must carry rule." He went on to state, "and through good-faith negotiations, we have reached a workable compromise guaranteeing that this important form of television will remain an integral part of cable's basic programming package." The legislative language reflecting the agreement Mr. Mooney and I reached is attached as Exhibit 11.

32. In the period following the negotiation of the NCTA-NAPTS agreement, NCTA made significant efforts to head off adverse cable actions involving public television stations. Dr. McGuire, the APTS Director of Planning and Research, filled the role of liaison with the cable industry, working with an NCTA representative. When APTS was notified of a public television station that had received a threat or experienced an actual drop or shift, Dr. McGuire would contact NCTA to seek assistance. In many cases, NCTA was able to persuade the cable operator to reverse its action. As a result of these efforts, public television stations experienced relatively few drops or shifts in the 1990 to 1992 period.

EXPERIENCE SINCE THE 1992 CABLE ACT

33. Since enactment of the 1992 Cable Act, APTS has provided stations with advice on how to enforce their must carry rights. Public television stations have had varying experiences in attempting to enforce these rights. Some stations have been relatively successful in gaining carriage, while others have had considerable difficulty. A number of stations have found it necessary to file complaints with the Federal Communications Commission to enforce their must carry rights.

34. In preparing this declaration, I reviewed a list of the resolved and pending complaints that were filed by public television stations with the

Federal Communications Commission. This list, along with the underlying orders from the FCC reflected in the list, are attached as Exhibit 12. As of May 1, 1995, twenty-eight stations have filed 175 complaints with the Federal Communications Commission. Out of 170 complaints that have been resolved (5 are still pending), the Commission has granted carriage, or the complaint has been dismissed because the cable company agreed to carriage, in 135 instances (or almost 80 percent of the cases).

35. Even after cable systems have been ordered by the FCC to carry public television stations, some have resisted. A-R Cable Services - ME, Inc. has filed a lawsuit in federal court in Maine seeking relief from an FCC order to carry a public television station in Lewiston, Maine. (C.A. No. 95-134-P-H, filed April 21, 1995). Even though A-R Cable began carrying the station after it lost its request for a temporary restraining order, it is continuing to fight the FCC carriage order in court.

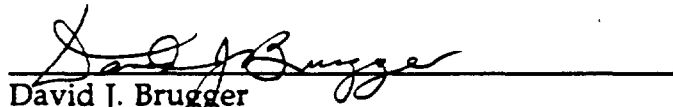
36. Many public television stations have not obtained carriage on all cable systems to which they have must carry rights. Based on my discussions with station personnel and my familiarity with station circumstances, I believe this is due primarily to the fact that the stations have limited resources to pursue their must carry rights. Cable operators have put forward various alleged justifications for not providing carriage or channel positions, including claims that the station's signal quality was inadequate, even though a station's independent measurements may indicate otherwise. Further, signal quality claims are not an absolute bar to carriage and can often be resolved through modest improvements by a station in its transmission equipment. In many cases, stations simply do not have sufficient staff or financial resources to challenge cable systems' denial of carriage or to pursue remedies at the FCC.

37. - APTS continues to regard must carry provisions as essential to the ability of public television stations to gain access to a broad range of viewers. Cable penetration is currently above 60 percent on a national basis. Thus, loss of access to cable subscribers can cut down very substantially on a station's ability to reach viewers. In addition, there are many more cable programmers now than there were five years ago. Cable operators have an incentive to carry cable programming because (unlike public television) such programming can provide the operator with additional revenue streams, especially in the case of pay-per-view channels. As cable operators fill their available channel capacity with cable network programming, there will be less room for public television stations, at least until cable operators choose to expand their channel capacity significantly. Finally, market incentives will prompt cable operators to drop public television stations or shift them to less desirable channels in an environment in which there is no threat of regulation. As commercial enterprises, cable systems lack incentives to carry programming that does not attract significant dollars or audience. Public television stations, in fulfilling their mandate to serve audiences not served by commercial enterprises, often carry precisely the programming that cable systems find economically unattractive. While a cable operator may carry the principal public television station in a market, in order to attract some subscribers, it is likely to be reluctant to carry a second or third public television service that focuses on instructional programming or minority interest programming. Without must

carry, public television stations cannot effectively pursue the congressional mandate to provide services to all Americans.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 25, 1995.

A handwritten signature in cursive script, appearing to read "David J. Brugger", is written over a solid horizontal line.

David J. Brugger

President, Association of America's Public Television Stations